

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Service Rules for Advanced Wireless Services)	WT Docket No. 12-70
in the 2000-2020 MHz and 2180-2200 MHz)	
Bands)	
)	
Fixed and Mobile Services in the Mobile)	ET Docket No. 10-142
Satellite Service Bands at 1525-1559 MHz and)	
1626.5-1660.5 MHz, 1610-1626.5 MHz and)	
2483.5-2500 MHz, and 2000-2020 MHz and)	
2180-2200 MHz)	
)	
Service Rules for Advanced Wireless Services)	WT Docket No. 04-356
in the 1915-1920 MHz, 1995-2000 MHz,)	
2020-2025 MHz and 2175-2180 MHz Bands)	
)	

To: Chief, Satellite Division, International Bureau
Chief, Broadband Division, Wireless Telecommunications Bureau

OPPOSITION TO NTCH PETITION FOR RECONSIDERATION

Pursuant to Section 1.106(g) of the Commission's rules,¹ DISH Network Corporation ("DISH") submits this Opposition to the Petition for Reconsideration ("Petition") filed by NTCH, Inc. ("NTCH"). NTCH requests that the Commission reconsider its modification of the 2 GHz licenses held by DISH subsidiaries.² The Petition must be dismissed or denied, as NTCH lacks standing and the Petition has no legal basis.

¹ 47 C.F.R. § 1.106(g).

² NTCH, Inc. Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 18, 2013) ("Petition"). The Petition seeks reconsideration of the Commission's February 15, 2013 *Order of Modification* that modified the 2 GHz licenses held by DISH subsidiaries, Gamma Acquisition L.L.C. (E060430) and New DBSD Satellite Services G.P. (E070272). See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-

NTCH's Petition is procedurally and legally defective. First, despite admittedly lacking standing to protest the proposed modification before it was effective, NTCH argues that it may now seek reconsideration. This is incorrect—NTCH's lack of standing to seek reconsideration prior to the license modification bars NTCH from bringing a claim now. Finding a broader standing to request reconsideration of a license modification after it has been effectuated would thwart Congress' goal of limiting protests to a statutorily prescribed list of parties. Further, the Petition appears to rely on the proposition that the license modification effected by the Commission was too broad. Court and Commission precedent affirm that the Commission acted well within the authority granted by Section 316 in modifying the licenses. In addition, the cases cited by NTCH do not support its argument. NTCH's argument is also at odds with its own prior advocacy: NTCH has previously urged the Commission to extinguish DISH's licenses under Section 316. Neither NTCH's prior argument (that Section 316 is so broad as to allow actual or effective revocation) nor its new one (that Section 316 is not broad enough to permit a license change that allows a licensee to better serve the public) is correct. As for NTCH's request that the Commission prohibit the use of the band for Mobile-Satellite Service ("MSS"), it is nothing more than the reiteration of an already-rejected request.

2200 MHz Bands, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, *Order of Modification*, DA 13-231 (rel. Feb. 15, 2013). NTCH has filed a similar meritless petition for reconsideration against the *AWS-4 Order*. NTCH, Inc. Petition for Reconsideration, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142 (filed Mar. 7, 2013) ("AWS-4 Order Petition") (challenging Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, *Report and Order and Proposed Order of Modification*, 27 FCC Rcd. 16102 ¶ 172 (2013) ("AWS-4 Order")).

I. NTCH HAS NO STANDING

NTCH admits that it did not have standing to protest the Commission's modification under Section 316.³ Section 316 limits the standing to protest a modification to the holder of the license (in this case, DISH) or "[a]ny other licensee or permittee who believes its license or permit would be modified by the proposed action."⁴ NTCH fits into neither of these categories and therefore had no standing to protest the Commission's modification.

Nevertheless, NTCH now believes it has standing to ask the Commission to reconsider the modification. This raises a question: does a party with no standing to protest against a modification nevertheless have standing to file a petition for reconsideration of the modification? The answer is no. NTCH's position would defeat the limitation of Section 316. If someone not allowed to protest could nonetheless appeal, the same harm that Congress intended to avoid by limiting standing would be incurred. In fact, the harm would be worse, because the eggs would have to be unscrambled in the event of a successful appeal. The resulting scheme would be one where the Commission would not have the opportunity to consider someone's objections before acting, but would then be required to entertain these objections after a license is modified.

In addition, NTCH's stated desire that it "would like to bid on the licenses" for a service where no auction has even been proposed appears too remote and speculative to confer standing in this case,⁵ even if a reconsideration petition of a Section 316 modification by someone other than an affected licensee could be entertained.

³ Petition at 2.

⁴ 47 U.S.C. § 316(a)(1), (2).

⁵ See, e.g., Improving Public Safety Communications in the 800 MHz Band, *Order*, 26 FCC Rcd. 5004, 5009 ¶ 16 (2011) (citing to Wireless Co., L.P., *Order*, 10 FCC Rcd. 13233 (1995); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd. 4082 (1988); National Broadcasting Co., *Memorandum Opinion and Order*, 37 FCC 2d 897, 898 (1972); *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386 (D.C. Cir. 1996)). The Commission has "consistently

II. THE COMMISSION’S USE OF SECTION 316 WAS APPROPRIATE

NTCH’s main argument is that the Commission exceeded its Section 316 modification authority by fundamentally changing the nature of DISH’s licenses. According to NTCH, the modification was too much of a “fundamental change” to qualify under Section 316.⁶ NTCH is incorrect; the Commission acted well within its authority when it modified DISH’s licenses under Section 316. The Communications Act’s Section 316 authority does not distinguish between “major” and “minor” modifications. The lack of such a distinction is telling; Congress knew to differentiate between major and minor changes when it wanted the two treated differently.⁷

As the *AWS-4 Order* notes, the Commission has repeatedly exercised its Section 316 authority when acting to eliminate inevitable harmful interference, as it did with these licenses.⁸ In the *AWS-4 Order*, the Commission made specific and detailed findings that harmful interference could be avoided only if the 2 GHz MSS and AWS-4 terrestrial spectrum rights were controlled by the same entity, requiring the Commission to act through license modification rather than a system of competitive bidding.⁹ Moreover, the *AWS-4 Order* made detailed and rigorously supported findings that the public interest would be served by adding AWS-4 terrestrial authority to DISH’s existing MSS licenses.¹⁰

held that claims amounting to a “remote” or “speculative” injury are insufficient to confer standing” and that “claims based on hypothetical future applications for spectrum are too remote and speculative to confer standing.” *Id.*

⁶ AWS-4 Order Petition at 4-7.

⁷ See 47 U.S.C. § 309(c)(1) (carving out “minor” amendments for separate treatment).

⁸ *AWS-4 Order*, 27 FCC Rcd. at 16167-68 ¶ 172.

⁹ *Id.* at 16168 ¶¶ 174-75.

¹⁰ *Id.* at 16168, 16169-73 ¶¶ 174, 176-85.

Indeed, the Commission’s Section 316 modification in this case is limited when compared to its previous uses of Section 316. As the *AWS-4 Order* notes, the Commission’s modification is of “a much more limited nature than in previous exercises of Section 316 authority,” such as the 800 MHz rebanding for Sprint or the relocations of Digital Electronic Message Service (“DEMS”) licensees.¹¹ The authority DISH had before the Section 316 modification is for the same spectrum and the same services (MSS and terrestrial wireless) that it has now.¹² There was no “fundamental” change to the authorization that would go beyond the scope of Section 316.

NTCH’s argument is especially surprising because NTCH has relied on Section 316 to propose a far more significant modification—the outright elimination of DISH’s MSS and terrestrial authority.¹³ As DISH has pointed out, eliminating a license would indeed overstep the bounds of the modification provision for a simple reason: there is a different statutory section, Section 312, governing license revocation.¹⁴ That section subjects the revocation process to different requirements than those applicable under Section 316, including a hearing.¹⁵ By the same token, a modification limiting the rights of a licensee could well qualify as an effective revocation that may not be attempted under the guise of Section 316.¹⁶ But this is not the case

¹¹ *Id.* at 16168 ¶ 175.

¹² *Id.* at 16219 ¶ 317.

¹³ AWS-4 Order Petition at 7-8; Comments of NTCH, Inc., WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, at 8-9 (May 17, 2012).

¹⁴ Reply Comments of DISH Network Corporation, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, at 19-21 (June 1, 2012).

¹⁵ 47 U.S.C. § 312. None of the instances that would permit the Commission to revoke DISH’s licenses are present here.

¹⁶ See License Communications Services, Inc., Licensee of Industrial/Business Pool (YG) Station WPQF492, Los Angeles County, California, Petition for Partial Reconsideration and Request for Further Modification of License, *Order*, 24 FCC Rcd. 3228, 3231 ¶ 9 (2009) (a purported

here, where the Commission is modifying a license to enable the licensee to better serve the market. Neither of NTCH's contradictory arguments is therefore correct.

The cases cited by NTCH in fact support DISH's position rather than NTCH's. In *MCI*, the Supreme Court held that elimination of a license—what NTCH had originally proposed—oversteps the bounds of Section 316.¹⁷ On the other hand, the D.C. Circuit held in *Community Television* that a Section 316 modification was valid where the Commission issued a modification that allowed a licensee to provide essentially the same services but with additional flexibility to improve its offerings,¹⁸ as it has done here. Similarly in *Cellco*, the imposition of new rules was not viewed as an impermissible fundamental change to a license.¹⁹ Thus, the Commission acted well within its Section 316 authority when it modified DISH's licenses.

III. NTCH'S CALL FOR THE ELIMINATION OF THE MSS LICENSES HAS BEEN REJECTED ALREADY

NTCH also states that the Commission should have eliminated MSS use of the 2 GHz band.²⁰ This is an argument that the Commission has already examined and rejected. In fact, the Commission has examined the appropriateness of MSS use of the band already twice in the past two years—in the context of the 2 GHz Band Co-Allocation proceeding and the proceeding

modification deleting 40 percent of the frequencies of a licensee has the “cumulative effect” of revoking the license entirely, which entails “additional procedural requirements”); Reply Comments of DISH Network at 19 (“the Commission’s license modification authority under Section 316 does not include the power to significantly diminish, eliminate, or ‘fundamental[ly] change’ the nature of the service that a licensee may provide under an existing license.”) (quoting *MCI v AT&T*, 512 U.S. 218, 228 (1994)).

¹⁷ *MCI*, 512 U.S. at 228. In finding that a significant diminution or elimination is beyond the scope of a modification, the Supreme Court colorfully stated: “It might be good English to say that the French Revolution ‘modified’ the status of the French nobility but only because there is a figure of speech called understatement and a literary device known as sarcasm.” *Id.*

¹⁸ *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000).

¹⁹ *Cellco Partnership v. FCC*, 700 F.3d 534, 544 (2012).

²⁰ AWS-4 Order Petition at 7-8.

below. The Commission was correct in the *AWS-4 Order* to dismiss NTCH's request in this rulemaking as an untimely petition for reconsideration of its *2 GHz Band Co-Allocation Report and Order*.²¹ NTCH's suggestion that the Commission prohibit MSS use of the band by rule is the same request addressed in a new cloak. A prohibition on the use of an allocation is no different than suppressing the allocation altogether.

In addition, prohibiting MSS in the 2 GHz band would deprive the public of benefits of MSS. As the Commission has already concluded, MSS serves important needs, such as rural access and disaster recovery, and is particularly well-suited for meeting the needs of the transportation, petroleum, and other vital industries.²² NTCH's request, therefore, would disserve the public interest.

IV. THE COMMISSION SHOULD NOT RESCIND THE MODIFICATIONS PENDING RECONSIDERATION OF ITS RULES

NTCH requests that the Commission "rescind the license modifications pending final resolution of the issues raised in Docket No. 12-70"²³ without citing any legal authority that would permit the Commission to do so. This is essentially a request for a stay. But NTCH's Petition does not even address,²⁴ let alone meet, the standard prerequisites to a stay.²⁵ NTCH is

²¹ *AWS-4 Order*, 27 FCC Rcd. at 16171 ¶ 180 & n.532.

²² Fixed and Mobile Services in the Mobile Satellite Services Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, *Report and Order*, 26 FCC Rcd. 5710, 5711 ¶ 4 (2011).

²³ Petition at 3.

²⁴ Because NTCH fails to even address the requirements for a stay, this request should be dismissed. *See, e.g.,* Indiana and Sprint Nextel Corporation, *Order*, 26 FCC Rcd. 3682, 3683 ¶ 3 (2011); Phone Depots Inc. d/b/a Mobilefone Radio System, *Memorandum Opinion and Order*, 91 FCC 2d 1244, 1246 ¶ 6 (1982) (summarily denying motion to stay for failure to discuss the criteria for stay).

²⁵ A petitioner seeking a stay must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. *Virginia Petroleum*

not likely to prevail on the merits for the reasons discussed above. NTCH will suffer no harm, and would certainly not suffer irreparable harm, if its request is not granted, as the only interest it cites to is that “it would like to bid on DISH’s license.” DISH and the public, however, would be irreparably harmed by a rescission of the license modifications, as such an action would halt deployment of DISH’s MSS and terrestrial mobile broadband deployment.

V. CONCLUSION

NTCH has no standing, legal basis, or public interest rationale for its Petition. It should be rejected.

Respectfully submitted,

/s/

Jeffrey H. Blum
Senior Vice President and
Deputy General Counsel
Alison A. Minea
Director and Senior Counsel
Regulatory Affairs
Hadass Kogan
Associate Corporate Counsel
DISH Network Corporation
1110 Vermont Avenue, NW, Suite 750
Washington, DC 20005
(202) 293-0981

Pantelis Michalopoulos
Christopher Bjornson
Andrew W. Guhr
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000
Counsel for DISH Network Corporation

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Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of March 2013, I caused a copy of the foregoing Opposition of DISH Network Corporation was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served upon the party below by First Class Mail and electronic mail:

Donald J. Evans,
evans@fhhlaw.com
Davina S. Sashkin,
sashkin@fhhlaw.com
FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Counsel for NTCH, Inc.

/s/ Andrew W. Guhr
Andrew W. Guhr